EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK HIRSCH, on behalf of himself and all others similarly situated, Plaintiff, v. NETFLIX, INC., WAL-MART.COM USA LLC, and WAL-MART STORES, INC., Defendants.	**CIVIL ACTION NO.** CV 09 0375 **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

COMPLAINT

Plaintiff Frank Hirsch, individually and on behalf of all those similarly situated, brings this action for treble damages under the antitrust laws of the United States against Defendants, and demands a trial by jury.

NATURE OF THE ACTION

1. This suit is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a plaintiff Class, defined more fully below, consisting of all persons and entities that paid a subscription fee to Defendant Netflix, Inc. to rent DVDs between May 19, 2005 and the present (the "Class Period").

2. Plaintiff alleges that on or about May 19, 2005, the named Defendants entered into an illegal anticompetitive agreement (the "Agreement") to divide the markets for sales and online rentals of DVDs in the United States, with the purpose and effect of unreasonably restraining trade in at least the market for online DVD rentals. The mechanics of the Agreement, as set forth herein, allowed Defendant Netflix to charge supra-competitive prices to Plaintiff and other Class members.

3. The discussions that ultimately led to the Agreement began in early 2005. At that time, Defendants Netflix and Wal-Mart.com were competing directly in the market for online DVD rentals. In addition, the companies were potential competitors in the retail market for sales of new DVDs. Netflix, the leader in the online DVD rental market, was preparing to enter the retail DVD market and would have direct marketing access to its substantial subscriber base. In short, Netflix viewed Defendant Wal-Mart.com as a significant competitive threat in the online DVD rental market while Wal-Mart Stores and Wal-Mart.com, together the clear leader in the retail DVD market, viewed Netflix as a significant competitive threat. To address these concerns, the Defendants entered into the Agreement, pursuant to which Wal-Mart.com agreed to exit the online DVD rental market and Netflix agreed not to enter the retail DVD market, but instead to actively promote DVD sales by Wal-Mart.

4. Defendant Wal-Mart Stores participated directly in the Agreement described herein. Indeed, the former Chief Marketing Officer of Wal-Mart.com was named as the Chief Marketing Officer of Wal-Mart Stores prior to the Agreement being publicly disclosed. At the time of the public announcement, that executive, John Fleming, was acting both at Chief Marketing Officer of Wal-Mart Stores and had oversight responsibility for Wal-Mart.com.

5. Since entering into the Agreement, Wal-Mart has refrained from renting DVDs online and Netflix has refrained from selling DVDs. As a result, the Agreement strengthened the already dominant respective market positions of Netflix and Wal-Mart in the online rental and

retail markets. In turn, Netflix was able to charge higher subscription fees for online DVD rentals than it would have in the absence of the Agreement.

6. The impact on the Class has been and continues to be substantial. As a result of the Agreement, purchasers of Netflix's subscription service, including Plaintiff, paid significantly more for online DVD rentals during the Class Period than they would have paid in a competitive market.

JURISDICTION AND VENUE

7. This action is instituted under Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15 and 26 to recover treble damages, and the costs of this suit, including reasonable attorneys' fees, against Defendants for the injuries sustained by Plaintiff and the members of the Class by reason of Defendants' violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2.

8. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337 and Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15(a) and 26.

9. Venue is appropriate in this District under Sections 4, 12 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 22 and 26 and 28 U.S.C. § 1391(b), (c) and (d), because during the Class Period the Defendants resided or transacted business in this District, because a substantial part of Plaintiff's claims occurred in this District, and because a substantial portion of the affected interstate commerce described herein was carried out in this District.

PARTIES

10. Plaintiff Frank Hirsch is a resident of Deerfield, Illinois. During the Class Period, Plaintiff subscribed to Netflix and paid subscription fees to rent DVDs for personal use. Plaintiff suffered injury as a result of the illegal conduct described herein.

11. Defendant Netflix, Inc. ("Netflix") is a Delaware corporation headquartered at 100 Winchester Circle, Los Gatos, California, 95032. Netflix's revenues exceed $1 billion annually. Through www.netflix.com, Netflix rents DVDs directly to consumers throughout the United States. Throughout the Class Period, Netflix has dominated the online DVD rental market, accounting for approximately 75 percent of all such rentals in the United States.

12. Defendant Wal-Mart Stores, Inc. ("Wal-Mart Stores") is a Delaware corporation headquartered at 702 S.W. Eighth Street, Bentonville, Arkansas, 72716. Wal-Mart Stores' revenues exceed $300 Billion annually and Wal-Mart Stores is the largest retailer in the United States. Wal-Mart Stores is also the largest seller of new DVDs in the United States, accounting for over one-third of all such sales through both its brick-and-mortar stores and online via www.walmart.com. From 2002-2005, Wal-Mart Stores' wholly-owned subsidiary Wal-Mart.com, USA, LLC competed with Netflix in the online DVD rental market through the Wal-Mart DVD rental service.

13. Defendant Wal-Mart.com, USA, LLC ("Wal-Mart.com"), a subsidiary of Wal-Mart Stores, Inc., is a Delaware company with its headquarters at 7000 Marina Boulevard, Brisbane, California, 94005. Wal-Mart.com is the online component of Wal-Mart Stores. Prior to the conspiracy alleged herein, Wal-Mart.com was a leading competitor of Netflix in the online DVD rental market through the Wal-Mart DVD Rentals service. Wal-Mart.com is ranked as the 14th largest online retailer in the United States and sells DVDs directly to consumers nationwide.

14. Wal-Mart Stores and Wal-Mart.com operate as a single commercial enterprise. The Chief Marketing Officer of Wal-Mart Stores explained the relationship as follows: "Wal-Mart stores set up Wal-Mart.com as a separate company with some outside investors, but within six months Wal-Mart Stores bought back the outside interest and Wal-Mart.com; Wal-Mart.com now

serves as a 'marketing channel' for Wal-Mart Stores." Wal-Mart Stores is the registrant of the www.walmart.com and www.walmartdvdrentals.com domain names.

15. Wal-Mart Stores was actively involved in the conspiracy alleged herein, as set forth further below. Both Wal-Mart Stores and Wal-Mart.com are liable for the unlawful conduct alleged herein. Indeed, among other things, both Wal-Mart Stores and Wal-Mart.com participate in and benefited from the Agreement. Additionally, Wal-Mart Stores directed, ratified, approved, supported, or otherwise aided and abetted Wal-Mart.com's unlawful acts.

16. Wal-Mart Stores had a clear incentive to enter into the Agreement alleged herein. In addition to its position as full owner of Wal-Mart.com, Wal-Mart Stores obtains substantial revenues from its sales of new DVDs, as well as store traffic resulting sales of other retail goods, which would have been threatened by Netflix's entry into the market for new DVD sales, and which were enhanced by Netflix's promotion of Wal-Mart Stores and Wal-Mart.com through the Agreement. Indeed, it was Wal-Mart Stores that announced the Agreement with Netflix (in a press release identifying Wal-Mart Stores in the "About" section). That announcement quoted John Fleming, then Chief Marketing Officer of Wal-Mart Stores, and explained that Wal-Mart.com's DVD sales are in fact Wal-Mart Stores' "online movie sales business."

17. Whenever in this Complaint an allegation refers to any act, deed or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, agents, employees or representatives while actively engaged in the management, direction, control, or transaction of the corporation's business or affairs.

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action on behalf of himself and as a class action under the provisions of Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the following Class:

> All persons and entities in the United States that paid a subscription fee to Netflix to rent DVDs between May 19, 2005 and the present. Excluded from the Class are Defendants, their representatives, and any present and former parents, subsidiaries, and affiliates.

19. Due to the nature of the trade and commerce involved, Plaintiff believes that there are millions of Class members as above described, the exact number and their identities being known to Defendants.

20. The Class is so numerous and geographically dispersed that joinder of all members is impracticable.

21. There are questions of law and fact common to the Class, including:

a. Whether Defendants engaged in a combination and conspiracy among themselves to allocate markets;

b. The identity of the participants of the conspiracy;

c. The duration of the conspiracy alleged herein and the acts performed by Defendants in furtherance of the conspiracy;

d. Whether the alleged conspiracy violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2;

e. Whether the conduct of Defendants, as alleged in this Complaint, caused injury to the business or property of the Plaintiff and the other members of the Class;

f. The effect of Defendants' conspiracy on the sales and/or rentals of DVDs in the United States during the Class Period; and

g. The appropriate class-wide measure of damages.

22. Plaintiff is a member of the Class, Plaintiff's claims are typical of the claims of the Class members, and Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff is a direct purchaser of Netflix's subscription rental service and its interests are aligned with, and not antagonistic to, those of the other members of the Class.

23. Plaintiff is represented by counsel who are competent and experienced in the prosecution of antitrust and class action litigation.

24. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

25. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

26. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class is readily definable and is one for which records should exist. Prosecution as a class action will eliminate the possibility of repetitious litigation. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. This class action presents no difficulties in management that would preclude maintenance as a class action.

TRADE AND INTERSTATE COMMERCE

27. The activities of Defendants described herein were within the flow of and substantially affected interstate commerce.

28. During the Class Period, Defendants sold and/or rented DVDs throughout the United States.

29. During the Class Period, Defendants sold and/or rented DVDs in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which the Defendants sold and/or rented DVDs.

30. The conspiracy in which the Defendants participated had a direct, substantial, and reasonably foreseeable effect on United States commerce.

INTRADISTRICT ASSIGNMENT

31. Pursuant to Civil L.R. 2-2, this case should be assigned to the San Francisco Division because a substantial part of the events giving rise to the claims occurred within this division and Defendant Wal-Mart.com is based in San Mateo County.

RELEVANT MARKET

32. For purposes of Plaintiff's claim under Section 1 of the Sherman Act, the Agreement alleged herein is *per se* illegal and therefore requires no definition of the relevant market.

33. For purposes of Plaintiff's claims under Section 2 of the Sherman Act, the Relevant Market is the "Online DVD Rental Market" in the United States.

34. "DVD" refers to a Digital Video Disc or Blu-ray Disc containing commercially recorded content for personal viewing. DVDs are the primary medium through which movies and other recorded entertainment are distributed in the United States. Revenues derived from DVDs far exceed those from box office receipts. Moreover, DVDs have become a particularly lucrative means of distributing previously aired television programs, surpassing even television syndication rights as a source of revenue stream in many cases. For purposes of the allegations herein, "DVD" does not refer to blank Digital Video Discs used to store or record data.

35. The Online DVD Rental Market includes all rentals of DVDs made online via subscription for delivery by mail. Throughout the Class Period, there have been no reasonably interchangeable substitutes for this service.

36. Consumers participating in the Online DVD Rental Market typically pay a monthly subscription fee to rent DVDs from an online service provider, such as Netflix, Blockbuster

Online, or (prior to May 19, 2005) Wal-Mart DVD Rentals. There are generally no late fees or due dates for returning the rented DVDs, but the consumer pays the set subscription fee regardless of how many DVDs are rented each month.

37. To rent DVDs, subscribing consumers indicate their rental preferences by completing an online profile that lists the movies they wish to rent in order of preference. Netflix calls this a subscriber's "Queue." The subscriber's top ranked available DVDs are then sent by the provider to the subscriber's home via U.S. mail. To return the DVD, the subscriber uses a postage prepaid envelope provided with the rental and mails it back. The service provider then mails the next movie on the costumer's list of preferred titles. The range of titles available from online service providers has grown over time and far surpasses the range available at any single video rental store.

38. From the consumer's perspective, online DVD rentals are a unique service not reasonably interchangeable with traditional video store rentals. To rent DVDs from stores, a customer must travel to the rental location, determine which titles are available, pay a rental fee for each DVD selected, and then return each rented DVD within the set rental period or potentially incur a late fee. During the Class Period, late fees accounted for as much as 20 percent of all revenues for traditional video rental stores.

39. There is no direct price competition between online DVD rental providers and other forms of DVD rental, including in-store, kiosk, or video downloading. In addition, changes in the price of online rentals do not closely track changes in the price of in-store rentals. The pricing of online rentals is generally nationwide in scope and is not affected by local in-store prices and competition. Consequently, the price of online rentals is generally the same for each customer, regardless of that customer's proximity to a video rental store.

40. Online DVD rental providers generally offer additional services, such as movie reviews and customer specific recommendations based on viewing and preference history. The cross-elasticity of demand across various DVD rental providers is such that a small but significant non-transitory increase in price would not cause consumers to switch from online rental to in-store rental (or any other method of DVD distribution) and *vice versa*.

The online DVD rental market is recognized as a distinct market by the public and the industry, including by the Defendants. Indeed, Defendants have confirmed and recognized the existence of a discrete online rental market. Recently, a Netflix executive told the Wall Street Journal that other types of rental services, such as kiosk and in-store rentals, do not present a direct competitive threat to Netflix. The same executive acknowledged that while video downloads may eventually become a more viable source of competition, DVD is likely to be the dominant medium for years to come.

41. Online DVD rentals are also a market distinct from DVD sales. The pricing of DVD sales and online DVD rentals are very different. For example, the price to buy a new DVD depends heavily on how popular it is, including whether it is a new release or how successful the title originally was at the box office or on television. By contrast, online DVD rental providers generally charge based on a subscription fee, regardless of whether the consumer is renting popular or obscure DVDs. The factors leading a consumer to purchase a DVD are much different from those that lead to renting a DVD. For example, a customer may intend to view a particular DVD numerous times and another DVD only once. Whether a DVD is new or used is not an issue in rental, but is a significant factor in sales since used DVDs are typically sold at a significant discount as compared to new DVDs

42. The Geographic Market for the Online DVD Rental Market is the United States. Among other things, shipping costs and international differences in DVD data encoding make it

neither practical nor feasible for rental providers located in other countries to rent DVDs to consumers in the United States.

MARKET POWER

43. Throughout the Class Period, Netflix dominated the Online DVD Rental Market, accounting for approximately 75 percent of all online DVD rentals in the United States. Netflix has achieved monopoly power in the Online DVD Rental Market in that it has the power to control price or exclude competition.

44. Netflix's monopoly power is strengthened by significant barriers to entry in the Online DVD Rental Market. Notably, there have been no significant market entrants in the more than three years since announcement of the Agreement,. Online DVD rental is highly capital intensive and rental providers must operate on a large scale to be successful. To ensure timely delivery, it is necessary to have a significant number of shipping facilities strategically located throughout the United States. In addition, rental providers must maintain extensive inventories of DVDs to meet customer demand. As Netflix CEO Reed Hastings stated, "[w]hen you think about the barriers to entry to this business, it is subtle because it appears easy. A kid can open a website. But the barriers to profitability are very large."

45. Since the Agreement was implemented, the Online DVD Rental Market has effectively included two competing firms: Netflix and Blockbuster Inc. ("Blockbuster"). Indeed, Blockbuster accounts for substantially all of the remaining 25 percent of online DVD rentals in the United States not controlled by Netflix. Some small entities account for less than 2percent of the market. During fiscal years 2005-2007 combined, Netflix earned nearly $4 billion in revenues and $1.3 billion in gross profit from online DVD rentals—a gross profit margin of over 33 percent. As a result of Netflix's abuse of its monopoly power, as alleged herein, its subscription fees have been higher than they otherwise would have been.

46. Wal-Mart Stores and its wholly-owned subsidiary Wal-Mart.com combined account for an industry-leading 40 percent of domestic DVD retail sales. During fiscal years 2005-2008 combined, the Wal-Mart entities earned revenues in excess of $25 billion from retail sales of DVDs. As set forth above, both Wal-Mart Stores and Wal-Mart.com benefit from the Agreement alleged herein.

THE UNLAWFUL AGREEMENT

47. In early 2005, Netflix faced increasing competition from Wal-Mart DVD Rentals and from Blockbuster Online and its stock price had dropped significantly.

48. In mid-2004, Netflix was charging $21.99 for its most popular subscription rental plan. Blockbuster entered the Online Rental Market in August 2004, initially charging $19.99, but subsequently reducing its price to $17.49 in November 2004 for its competing plan. Then Wal-Mart DVD Rentals reduced its subscription rate from $18.86 to $17.36. In reaction to these price cuts, Netflix reduced its subscription rate to $17.99 per month. Blockbuster then further decreased its price to $14.99.

49. During this same time period, Wal-Mart was facing growing competition from in-store and online channels of distribution in new DVD sales, including competition from Amazon.com. Netflix, with its subscriber base of millions of DVD renters (also potential purchasers of new DVDs), represented a substantial competitive threat to Wal-Mart. Sales and profits of Wal-Mart Stores and Wal-Mart.com stood to suffer if Netflix began selling new DVDs to its subscriber base. Conversely, Wal-Mart obviously stood to gain further market share (and profits) in the sale of new DVDs if the Netflix subscribers were to make their purchases of new DVDs from Wal-Mart.

50. On January 7, 2005, Wal-Mart DVD Rentals dropped subscription rate for its most popular DVD rental plan yet again, this time to $12.97 per month, creating further price pressure on Netflix.

51. In the face of this growing competition, Reed Hastings, the Chairman and CEO of Netflix, called John Fleming, then the CEO of Wal-Mart.com, and invited him to dinner. Fleming accepted the invitation and the two met together in January 2005 and initiated discussions that ultimately resulted in the unlawful Agreement alleged herein. *See* "Netflix 1, Wal-Mart 0," May 20, 2005 *BusinessWeek* article, available at http://www.businessweek.com/technology/content/may2005/tc20050520_3983_tc024.htm; "Netflix Makes It Big In Hollywood," June 13, 2005 Fortune Magazine article, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/06/13/8262553/index.htm.

52. On April 21, 2005, during Netflix's First Quarter earnings call with financial analysts, only weeks before publicly announcing the Agreement, Hastings made clear the motive for Netflix to conspire with Wal-Mart Stores and Wal-Mart.com:

> In terms of profitability over the coming years, the key issue is the number of major competitors. If there are only two major players, Blockbuster and Netflix, the profitability may be substantial like other two-firm entertainment markets. If, on the other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in online rental, then the profits would likely be small.

Hastings went on to "predict" on the conference call that "the likely case is [that] online rental becomes a two-firm market over the coming years." *See* Q1 2005 Netflix.com Earnings Conference Call – Final, available at http://www.accessmylibrary.com/coms2/summary_0286-6536235_ITM, Publication Date: 21-Apr-05.

53. On May 19, 2005, shortly after Fleming had been promoted to Chief Marketing Officer of Wal-Mart Stores, Defendants issued a joint statement announcing the Agreement, which unlawfully divided and allocated the markets for DVD sales and rentals, and in fact created the

two-firm market Hastings envisioned. *See* "Wal-Mart, Netflix agree on DVD deal," May 19, 2005 Reuters article available at http://news.zdnet.com/2100-9595_22_195757.html.

54. Pursuant to the Agreement, Wal-Mart.com announced to all Wal-Mart DVD Rentals subscribers that it was exiting the online DVD rental business and that those subscribers could be transferred to Netflix. Wal-Mart.com took additional steps to affirmatively implement the Agreement by adding on its own Internet site a prominently placed hyperlink to the Netflix website. Since the date of their joint announcement on May 19, 2005 (apart from the 30 days that Wal-Mart.com took to wind down its existing online rental business), neither Wal-Mart.com nor Wal-Mart Stores has participated in the Online DVD Rental Market, and Netflix has not sold new DVDs.

55. As a result of the Agreement, downward pricing pressure from Wal-Mart.com was eliminated and the Online DVD Rental Market was reduced to two competitors. Absent the Agreement, Netflix would have been forced to lower its subscription rate further in response to price pressure from Wal-Mart. With a key competitor in the Online DVD Rental Market eliminated, Blockbuster raised its subscription price in July 2005 from $14.99 per month to $17.99 per month, matching Netflix. This was consistent with Hastings' expectation that "[i]f there are only two major players, Blockbuster and Netflix, the profitability may be substantial like other two-firm entertainment markets." In his next earnings call with financial analysts on July 25, 2005, Netflix CEO Hastings boasted about his apparent "prescience," noting that "[l]ast quarter we said online rental was shaping up to be a two-player market, and that is indeed what is happening." *See* Netflix Q2 2005 Earnings Conference Call Transcript, at p. 4, available at http://www.streetevents.com, Publication Date: July 25, 2005.

56. The Agreement was not in the independent self-interest of Wal-Mart Stores, Wal-Mart.com, or Netflix. But for Netflix's agreement not to compete in the market for new DVD

retail sales, there was simply no reasonable basis for Wal-Mart to withdraw from the online rental market and promote Netflix. Similarly, but for Wal-Mart's agreement to exit the Online DVD Rental Market, there was no rational basis for Netflix to foreclose the opportunity to sell DVDs to its millions of subscribers, a base of customers who reportedly purchase an average of 25 DVDs per year each, and instead promote new DVD sales by Wal-Mart Stores and Wal-Mart.com.

ANTITRUST INJURY AND DAMAGES

57. The unlawful conspiracy alleged herein had at least the following effects:

(a) Prices charged by Netflix to Plaintiff and the members of the Class for online DVD subscription services were artificially fixed, raised, stabilized and maintained at artificially high and non-competitive levels in the United States;

(b) Plaintiff and the other members of the Class had to pay more for online DVD subscription services than they would have paid in a competitive marketplace, unfettered by Defendants' collusive and unlawful activities;

(c) Competition in the sale of online DVD subscription services was restrained, suppressed and eliminated in the United States; and

(d) As a direct and proximate result of the illegal combination, contract or conspiracy, Plaintiff and the members of the Class have been injured and financially damaged in their respective businesses and property, in amounts that are presently undetermined.

COUNT ONE
SHERMAN ACT SECTION 1 (15 U.S.C. § 1)
ILLEGAL MARKET ALLOCATION
(Against All Defendants)

58. Plaintiff incorporates and realleges each allegation set forth above, as if fully set forth herein.

59. Defendants have entered into a *per se* illegal market allocation agreement, in violation of Section 1 of the Sherman Antitrust Act, 15. U.S.C. § 1. Even if evaluated under the rule of reason, the Agreement is an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

60. Leading up to the Agreement, Netflix and Wal-Mart.com were actual competitors in the Online DVD Rental Market. In addition, Netflix was a potential competitor to Wal-Mart Stores and Wal-Mart.com in the new DVD sales market. Wal-Mart Stores and Wal-Mart.com were actual participants and Netflix was a potential participant, with the means and economic incentive to sell new DVDs in the absence of the Agreement.

61. Defendants shared a conscious commitment to a scheme designed to achieve the unlawful objective of dividing the markets for online DVD rentals and new DVD sales. The Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and Wal-Mart.com agreeing not to compete in that relevant market. The agreement also allocated new DVD sales to Wal-Mart Stores and Wal-Mart.com, with Netflix agreeing to refrain from selling new DVDs in competition with them. In addition to agreeing not to sell new DVDs, Netflix also agreed to provide valuable promotional services for Wal-Mart Stores and Wal-Mart.com. In so doing, Netflix provided significant consideration to Wal-Mart Stores and Wal-Mart.com for their agreement to withdraw from, and not to compete in, the Online DVD Rental Market.

62. The Agreement created significant anticompetitive effects with no corresponding precompetitive benefits. It eliminated competition in the relevant market, raising prices paid by customers. To the extent that there are any precompetitive benefits at all resulting from the agreement, they do not outweigh the agreement's anticompetitive effects. In any event, to the extent that there are any, they could have been achieved by less restrictive means.

63. As a result of this violation of law, Netflix's subscription prices charged to, and paid by, Plaintiff and the Class are, and have been, higher than they otherwise would have been.

COUNT TWO
SHERMAN ACT SECTION 2 (15 U.S.C. § 2)
Monopolization of Online DVD Rental Market
(Against Netflix)

64. Plaintiff incorporates and realleges the allegations set forth above, as if full set forth herein.

65. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits the willful monopolization of any part of the trade or commerce among the states.

66. Netflix has monopoly power in the Online DVD Rental Market.

67. Netflix has willfully acquired and maintained its monopoly power in the Online DVD Rental Market by its acts and practices described here, including by executing, implementing, and otherwise complying with the Agreement, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

68. As a result of the unlawful conduct alleged here, Netflix's subscription prices charge to, and paid by, Plaintiff and the Class, are, and have been, higher than they otherwise would have been.

COUNT THREE
SHERMAN ACT SCTION 2 (15 U.S.C. § 2)
Attempt to Monopolize Online DVD Rental Market
(Against Netflix)

69. Plaintiff incorporates and realleges the allegations set forth above, as if fully set forth herein.

70. If Netflix does not already have monopoly power, then Netflix has a dangerous probability of success in achieving monopoly power in the Online DVD Rental Market.

71. With the specific intent to achieve a monopoly, Netflix, by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

72. As a result of this violation of law, Netflix's subscription prices charged to, and paid by Plaintiff and the Class are, and have been, higher than they otherwise would have been.

COUNT FOUR
SHERMAN ACT SECTION TWO (15 U.S.C. § 2)
Conspiracy to Monopolize Online DVD Rental Market
(Against All Defendants)

73. Plaintiff incorporates and realleges the allegations set forth above, as if fully set forth herein.

74. Defendants shared a conscious commitment to a common scheme designed to achieve the unlawful objective of the monopolization of the Online DVD Rental Market. Prior to and at the time of the agreement, Netflix and Wal-Mart.com were actual competitors in the Online DVD Rental Market. Defendants conspired with the specific intent, knowledge, and purpose that their anticompetitive agreement would result in Netflix willfully acquiring and maintaining a monopoly in the Relevant Market. Wal-Mart Stores and Wal-Mart.com knew that the natural and probable consequence of the Agreement would be the monopolization of the relevant market by Netflix. Defendants have committed overt acts in furtherance of their conspiracy, including entering into, complying with, and implementing the Agreement, in violation of Section 2 of the Sherman Antitrust Act, 15. U.S.C. § 2.

75. As a result of this violation of law, Netflix's subscription prices charged to, and paid by Plaintiff and the Class are, and have been, higher than they otherwise would have been.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

A. That the Court determine this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

B. That the contract, combination or conspiracy, and the acts done in furtherance thereof by Defendants, be adjudged *per se* violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2.

C. That judgment be entered for Plaintiff and members of the Class against Defendants for three times the amount of damages sustained by Plaintiff and the members of the Class as allowed by law, together with the costs of this action, including reasonable attorneys' fees, pursuant to Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15 and 26.

D. That Plaintiff and the Class be awarded pre-judgment and post-judgment interest at the highest legal rate, from and after the date of service of this Complaint, to the extent provided by law;

E. That the Court award such other, further or different relief, including appropriate injunctive relief, as the case may require and as the Court may deem just and proper under the circumstances.

Dated: January 27, 2009

Respectfully submitted,

By: ______________________

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